MALAYSIA BUILDING SOCIETY BHD v. KCSB KONSORTIUM SDN BHD

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
MD RAUS SHARIF PCA
HASAN LAH FCJ
RAMLY ALI FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO.: 02(F)-13-02-2015(J)]
14 FEBRUARY 2017

LAND LAW: *Charge – Creation and validity of – Charge instrument in Form 16A filed at land registry – Charge mistakenly registered as first party charge instead of third party charge – Whether contrary to loan agreement and charge annexure – Whether Form 16A filed an insufficient instrument as envisaged by s. 340(2) of National Land Code – Whether charge defeasible – Whether error in Form 16A had effect of transferring charge into any other instrument of dealing – Whether parties prejudiced or misled by error – Whether error could be rectified by Registrar pursuant to s. 380(1)(b) of National Land Code – Whether court vested with power to direct Registrar to give effect to order under s. 417 of National Land Code – Whether charge valid*

LAND LAW: *Charge – Setting aside – Appeal against – Charge instrument in Form 16A filed at land registry – Charge mistakenly registered as first party charge instead of third party charge – Whether contrary to loan agreement and charge annexure – Whether Form 16A filed an insufficient instrument as envisaged by s. 340(2) of National Land Code – Whether charge defeasible – Whether error in Form 16A had effect of transferring charge into any other instrument of dealing – Whether parties prejudiced or misled by error – Whether error could be rectified by Registrar pursuant to s. 380(1)(b) of National Land Code – Whether court vested with power to direct Registrar to give effect to order under s. 417 of National Land Code – Whether charge valid*

The Government of Malaysia ('the Government') entered into a privatisation agreement with the respondent under which the respondent undertook to build an army camp for the Ministry of Defence ('the army camp project') at Pulai Johor Bahru. In exchange, the Government agreed to transfer to the respondent two pieces of land, to be used as security to raise the funds to enable the respondent to carry out the army camp project. Meanwhile, the respondent assigned all its rights and obligations under the privatisation agreement to one Kausar Corporation Sdn Bhd ('Kausar'). In 1997, Kausar entered into discussions with the appellant to finance the development of the lands. It was agreed that the appellant would provide funding for the development of the lands and that a joint venture agreement would be entered into with the respondent. Under the joint venture, a loan agreement was entered into between the appellant and a company, Definite Pure Sdn Bhd

('the borrower company'). The borrower company was the intended joint venture vehicle through which the development of the lands would take place. At the request of the borrower company and pursuant to the loan agreement, the appellant agreed to provide the borrower company with the following facilities ('loan facilities') (i) a term loan of up to RM456 million ('term loan') for principal only inclusive of a land bond ('land bond'); and (ii) an advance of up to RM65.1 million ('advance'). The borrower company was not in the position to provide security for the loan. As such, by the terms of the loan agreement, the respondent was to create a third party charge over the lands in favour of the appellant. On 2 August 1999, a charge was created by the respondent in favour of the appellant over the lands as a security for the term loan. The charge instrument in Form 16A was filed at the relevant land registry. It was, however, by mistake registered as a first party charge instead of a third party charge, which was contrary to all relevant documents *ie*, the loan agreement and the charge annexure. The respondent filed an originating summons ('OS') at the High Court to set aside the charge dated 2 August 1999 entered on the lands. The High Court, in allowing the respondent's application, held that the charge was void and could not be rectified by the Registrar under s. 380 of the National Land Code ('NLC'). The Court of Appeal agreed with the finding of the High Court that the mistake in Form 16A was not an error or omission capable of correction by the Registrar pursuant to s. 380(1)(a) to (c) of the NLC. Hence, this appeal. The questions of law that arose before this court were (1) whether indefeasibility under s. 340 of the NLC had relevance where the complaint was of an admitted mistake in the charge form where the charge was erroneously described and registered as a first party legal charge instead of a third party legal charge; (2) whether in the case of a mistake in an instrument of dealing under the NLC, the applicable provisions are ss. 207 and 380 of the NLC and s. 62 of the Interpretation Acts 1948 and 1967 to determine if the mistake was a correctable error; (3) whether the appropriate test to determine the error was of a matter of substance under the NLC and the Interpretation Acts 1948 and 1967 was whether the deviation had changed the character of the instrument or calculated to mislead the parties concerned; and (4) whether s. 417 of the NLC envisages a two stage procedure whereby a party has to first obtain a judgment or order in separate proceedings before the court can be moved under s. 417 to issue the appropriate directive to the Registrar or land administrator to give effect to the order.

Held (allowing appeal with costs)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) In considering whether the form filed suffered from any insufficiency or otherwise, this court was to look at the charge instrument alone without resorting to other documents *ie*, the loan agreement or the charge annexure, which was '... extraneous to the instrument and had nothing

to do with the instrument'. In the present case, certain paragraphs of the charge instrument were deleted hence making it into a first party instead of a third party charge as intended by the parties. Apart from that error, the instrument did not suffer from any other deficiency. Form 16A was sealed with the seal of the respondent's company and attested to by directors of the company or a director together with the secretary of the company. Form 16A filed in the present case was not an 'insufficient instrument' as envisaged by s. 340(2)(b) of the NLC which rendered the charge created pursuant thereto defeasible. (para 24)

(2) The deletion of the wrong paragraphs in Form 16A was a mere error and the error did not have the effect of transforming the charge into a transfer or to any other instrument of dealing. As to whether the error is remediable under the NLC, the two tests to be applied were (a) whether there has been substantial compliance of the prescribed form; and (b) whether any party has been prejudiced or misled by the error. Applying the two tests to the present case, there was no doubt that there existed substantial compliance with the prescribed form notwithstanding the error. Secondly, the respondent or any other party, had not been prejudiced by the error. The respondent had never denied that the loan sum of RM59 million had been disbursed to the borrower on the security of the charge, *albeit*, it was registered as a first party charge. This court did not see what difference it would make to the respondent whether it was a first party or third party charge, the relevant property was still subject to a charge. Therefore, the respondent had not been prejudiced or misled by the error. Thus, the error in Form 16A herein may be rectified by the Registrar pursuant to s. 380(1)(b) of the NLC to achieve what was intended by the parties. (paras 28 & 29)

(3) Any court making an order on any matter which relates to land may, consequent upon the order, give such direction to the Registrar as may be necessary to give effect to such order. There was nothing to say that a party has to firstly obtain the order of the court in one proceeding and subsequently apply in another proceeding for a direction under s. 417 of the NLC. Therefore, there was nothing to support the two stage approach/process. Under s. 417 of the NLC, the court is vested with the power to direct the Registrar to do anything it deems necessary to give effect to its judgment or order. This power was conferred by the NLC on the court to ensure that judgment or order of the court was duly carried out by the Registrar. Thus, the impugned charge was a valid charge. (paras 31-34)

Bahasa Malaysia *Headnotes*

Kerajaan Malaysia ('Kerajaan') memasuki satu perjanjian penswastaan dengan responden di mana responden diberikan tanggungjawab untuk membina kem tentera untuk Kementerian Pertahanan ('projek kem tentera') di Pulai Johor Bahru. Kerajaan bersetuju untuk memindah milik kepada

responden dua bidang tanah, untuk digunakan sebagai jaminan untuk mengumpul dana bagi membolehkan responden menjalankan projek kem tentera. Pada masa yang sama, responden menyerahkan segala hak dan obligasinya di bawah perjanjian penswastaan kepada satu Kausar Corporation Sdn Bhd ('Kausar.'). Pada 1997, Kausar memasuki perbincangan dengan perayu untuk membiayai pembangunan tanah. Dipersetujui bahawa perayu akan menyediakan pembiayaan untuk pembangunan tanah dan bahawa satu perjanjian usaha sama akan dimasuki dengan responden. Bawah perjanjian usaha sama, satu perjanjian pinjaman dimasuki di antara perayu dan sebuah syarikat, Definite Pure Sdn Bhd ('syarikat peminjam'). Syarikat peminjam adalah syarikat usaha sama yang digunakan untuk pembangunan tanah tersebut. Atas permintaan syarikat peminjam dan menurut perjanjian pinjaman, perayu bersetuju untuk menyediakan syarikat peminjam dengan kemudahan pinjaman ('kemudahan pinjaman') (i) pinjaman berjangka RM456 juta ('pinjaman berjangka') untuk prinsipal; hanya terangkum bon tanah; dan (ii) satu pendahuluan sehingga RM65.1 juta ('pendahuluan'). Syarikat peminjam tidak berada dalam kedudukan untuk menyediakan jaminan untuk pinjaman. Oleh itu, melalui syarat-syarat perjanjian pinjaman, responden harus membentukkan gadaian pihak ketiga ke atas tanah-tanah memihak kepada perayu. Pada 2 Ogos 1999, satu gadaian telah dibentukkan oleh responden yang memihak kepada perayu ke atas tanah-tanah sebagai jaminan pinjaman berjangka. Instrumen gadaian dalam Borang 16A telah difailkan di pejabat pendaftaran tanah relevan. Ini, walau bagaimanapun, secara khilaf didaftarkan sebagai gadaian pihak pertama dan bukan gadaian pihak ketiga, yang bertentangan dengan semua dokumen berkaitan iaitu perjanjian pinjaman dan lampiran gadaian. Responden memfailkan saman pemula ('SP') di Mahkamah Tinggi untuk mengetepikan gadaian bertarikh 2 Ogos 1999 yang dimasukkan atas tanah-tanah tersebut. Mahkamah Tinggi, dalam membenarkan permohonan responden, memutuskan gadaian adalah terbatal dan tidak boleh diperbetulkan oleh Pendaftar di bawah s. 380 Kanun Tanah Negara ('KTN'). Mahkamah Rayuan bersetuju dengan dapatan Mahkamah Tinggi bahawa kesalahan dalam Borang 16A bukan kesilapan atau peninggalan yang mampu diperbetulkan oleh Pendaftar di bawah s. 380(1)(a) ke (c) KTN. Oleh itu, rayuan ini. Persoalan undang-undang yang timbul di hadapan mahkamah ini adalah (i) sama ada hak tidak boleh disangkal di bawah s. 340 KTN relevan di mana aduan adalah berkenaan kesalahan yang diakui dalam gadaian yang secara khilaf dihuraikan dan didaftarkan sebagai gadaian sah pihak pertama dan bukan gadaian pihak ketiga; (ii) sama ada kes kesilapan dalam instrumen urusan di bawah KTN, peruntukan-peruntukan yang perlu diguna pakai adalah ss. 207 dan 380 KTN dan s. 62 Akta Tafsiran 1948 dan 1967 untuk menentukan jika kesalahan adalah kesalahan yang boleh diperbetulkan; (iii) sama ada ujian yang sesuai untuk menentukan kesalahan adalah perkara penting di bawah KTN dan Akta Tafsiran 1948 dan 1967 adalah sama ada penyimpangan telah berubah karakter instrumen atau boleh mengelirukan pihak-pihak terlibat; dan

(iv) sama ada s. 417 KTN menjangkakan prosedur dua peringkat di mana pihak harus pertama sekali memperolehi penghakiman atau perintah dalam prosiding berasingan di hadapan mahkamah sebelum mahkamah boleh, bawah s. 417 KTN mengeluarkan arahan sesuai kepada Pendaftar atau pentadbir tanah untuk memberi kesan pada perintah di bawah s. 417.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Dalam mengambil kira sama ada borang yang difailkan mengalami apa-apa kekurangan atau sebaliknya, mahkamah harus melihat kepada instrumen gadaian sahaja tanpa merujuk kepada dokumen-dokumen lain iaitu perjanjian pinjaman atau lampiran gadaian, yang '… extraneous to the instrument and had nothing to do with the instrument'. Dalam kes ini, beberapa perenggan gadaian instrumen telah dipadam oleh itu ia telah secara salah membuatkannya gadaian pihak pertama dan bukan gadaian pihak ketiga seperti yang diniatkan oleh pihak-pihak terlibat. Selain dari kesilapan itu, instrumen tidak mengalami apa-apa kecacatan. Borang 16A adalah dimeterai dengan cap mohor syarikat responden dan diperakui oleh pengarah-pengarah syarikat atau pengarah bersama dengan setiausaha syarikat. Borang 16A difailkan dalam kes ini bukanlah satu 'insufficient instrument' seperti yang dibayangkan oleh s. 340(2)(b) KTN, menyebabkan gadaian yang dibentukkan itu boleh disangkal.

(2) Pemotongan perenggan-perenggan salah dalam Borang 16A adalah hanya satu kesilapan semata-mata dan kesilapan tidak mempunyai kesan mengubah gadaian kepada pindah hak milik atau apa-apa urusan instrumen lain. Sama ada kesilapan itu boleh diperbetulkan di bawah KTN, dua ujian harus diguna pakai (i) sama ada terdapat pematuhan teguh borang yang disediakan; dan (ii) sama ada apa-apa pihak telah diprejudiskan atau dikeliru oleh kesilapan. Mengguna pakai kedua-dua ujian itu kepada kes ini, tiada keraguan bahawa wujudnya pematuhan teguh dengan borang yang disediakan meskipun terdapat kesilapan. Kedua, responden atau mana-mana pihak yang lain, tidak diprejudiskan oleh kesilapan itu. Responden tidak pernah menafikan bahawa jumlah pinjaman RM59 juta telah dibayar kepada peminjam atas jaminan gadaian, walaupun ia telah didaftarkan sebagai gadaian pihak pertama. Mahkamah ini tidak melihat apa-apa perbezaan akan berlaku kepada responden sama ada ia adalah gadaian pihak pertama atau gadaian pihak ketiga, tanah yang relevan itu masih tertakluk kepada gadaian. Oleh itu, responden tidak diprejudiskan atau terkeliru dengan kesilapan. Oleh itu, kesilapan dalam Borang 16A di sini boleh diperbetulkan oleh Pendaftar di bawah s. 380(1)(b) KTN bagi mencapai apa yang diniatkan oleh pihak-pihak.

(3) Mana-mana mahkamah yang membuat perintah atas apa-apa perkara berhubungan dengan tanah boleh, akibat daripada perintah, memberikan arahan kepada Pendaftar untuk memberi kesan kepada perintah sebegitu. Tidak terdapat kenyataan bahawa pihak harus pertama sekali memperolehi perintah mahkamah dalam satu prosiding, dan seterusnya memohon dalam prosiding yang lain untuk perintah di bawah s. 417 KTN. Oleh itu, tiada sokongan untuk proses/pendekatan dua peringkat. Di bawah s. 417 KTN, mahkamah diberikan kuasa untuk mengarahkan Pendaftar melakukan apa yang perlu untuk memberi kesan kepada penghakiman atau perintah. Kuasa ini telah diberikan oleh KTN kepada mahkamah bagi memastikan bahawa penghakiman atau perintah mahkamah dilaksanakan oleh Pendaftar. Oleh itu, gadaian yang dipertikaikan itu adalah gadaian yang sah.

Case(s) referred to:

Hassan Seman & Ors v. Jusoh Awang Chik [1981] 1 LNS 15 FC ***(refd)***

Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC ***(refd)***

Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1981] 1 LNS 114 ***(refd)***

Mook Meng Sun v. Loo Aa Kau & Ors [2002] 2 CLJ 142 HC ***(refd)***

Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No. 2) [1970] 1 LNS 150 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC ***(refd)***

Tan Soo Bing & Ors v. Tan Kooi Fook [1997] 1 CLJ 556 FC ***(refd)***

Tan Tock Kwee v. Tey Siew Cha & Anor [1995] 4 CLJ 658 HC ***(refd)***

The Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd [1997] 4 CLJ 170 CA ***(refd)***

United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b ***(refd)***

Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd [2011] 6 CLJ 137 FC ***(refd)***

Woon Kim Poh v. Sa'amah Hj Kasim [1986] 1 LNS 45 SC ***(refd)***

Legislation referred to:

National Land Code, ss. 243, 336, 340(2)(b), (3)(a), 380(1)(a), (b), (c), 417(1)

For the appellant - Cyrus Das, K Gobinath & V Rakesh; M/s Kadir Andri & Partners
For the respondent - Malik Imtiaz Sarwar & Gobind Singh Deo; M/s Lopez & Chin

[Editor's note: For the Court of Appeal judgment, please see Malaysia Building Society Berhad v. KCSB Konsortium Sdn Bhd [2014] 1 LNS 1938 (overruled)
For the High Court judgment, please see [2014] 1 LNS 102 (overruled)]

Reported by Suhainah Wahiduddin

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] This is an appeal against the decision of the Court of Appeal dated 16 October 2014 which dismissed the appellant's appeal with costs. Leave to appeal was granted by this court on 29 January 2015.

The Facts

[2] The facts pertinent to this appeal are as follows. The Government of Malaysia ("the Government") entered into a privatisation agreement with the respondent dated 10 July 1997 under which the respondent undertook to build an army camp for the Ministry of Defence ("the army camp project") at Pulai in Johor Bahru.

[3] In exchange, the Government agreed to transfer to the respondent the following two pieces of lands ("the lands") located in Johor Bahru:

(i) Lease No. 648, Lot 1876, Mukim of Plentong measuring in area of approximately 310.75 acres; and

(ii) Lease No. 548, Lot 139, Mukim of Tebrau measuring in area of approximately 71.406 acres.

[4] The lands were to be used as security to raise the fund to enable the respondent to carry out the army camp project. Meanwhile, the respondent assigned all its rights and obligations under the privatisation agreement to one Kausar Corporation Sdn Bhd ("Kausar").

[5] In 1997, Kausar entered into discussions with the appellant to finance the development of the lands. Pursuant to these discussions, it was agreed that the appellant will provide the funding for the development of the lands and that a joint venture agreement will be entered into with the respondent.

[6] Under the joint venture, a loan agreement was entered into on 21 October 1997 between the appellant and a company known as Definite Pure Sdn Bhd ("the borrower company"). The borrower company was the intended joint venture vehicle through which the development of the lands will take place.

[7] At the request of the borrower company and pursuant to the loan agreement dated 21 October 1997, the appellant agreed to provide the borrower company with the following facilities ("loan facilities"):

(i) A term loan of up to RM465 million ('term loan') for principal only inclusive of a land bond ('land bond'); and

(ii) An advance of up to RM65.1 million ('advance').

[8] The borrower company was not in the position to provide security for the loan. As such, by the terms of the loan agreement, the respondent was to create a third party charge over the lands in favour of the appellant.

[9] It is common ground that the parties were aware that the charge was to be a third party charge to be provided by the respondent. All relevant documents, such as the loan agreement, the charge annexure and the joint venture agreement spoke of the creation of a third party charge.

[10] On 2 August 1999 a charge was created by the respondent in favour of the appellant over the lands as a security for the term loan. The charge instrument in Form 16A was filed at the relevant Land Registry.

[11] Thereafter, on 29 August 2000 a second charge was created by the respondent in favour of the appellant over the lands as a security for the advance. The respondent has not applied for this second charge to be set aside.

[12] Both the charge instruments in Form 16A were, however, by mistake registered as a first party charge instead of a third party charge. This is contrary to all relevant documents ie, the loan agreement and the charge annexure which provide that the respondent was to create a third party charge in favour of the appellant.

High Court

[13] On 12 April 2013, the respondent filed an originating summons ("OS") No. 23M-154-04-2013 at the High Court of Johor Bahru to set aside the charge dated 2 August 1999 entered on the lands.

[14] In opposing the application, the appellant admitted that the charge was wrongly registered as a first party charge instead of a third party charge as a result of an error or mistake made in the instrument of charge (Form 16A). However, the appellant contended that the mistake did not nullify the charge as the mistake can be rectified under the relevant provisions of the National Land Code ("NLC"). The appellant further contended that the charge is indefeasible under s. 340 of the NLC except on the grounds as provided in s. 340(2) of the NLC.

[15] It is further contended that the error or mistake in wrongly registering the charge as a first party charge instead of a third party charge as such does not affect the validity of the charge as to warrant the setting aside of the same. On the other hand, the removal of the charge will be highly prejudicial to the appellant as it will deprive the appellant the security for the loan. In any event, the appellant contended that, the error is of no consequence as the Registrar of Titles ("Registrar") has the necessary power under s. 380 of the NLC to rectify the error.

[16] The High Court allowed the respondent's application to set aside the charge. The charge was held to be void and cannot be rectified by the Registrar under s. 380 of the NLC. In his judgment the learned Judicial Commissioner ("JC") held, *inter alia*, as follows:

> [19] The mistake in the Form 16A adverted to is serious and fundamental as, *inter alia*, it altered the status of the Plaintiff from that of a mere third-party charger to a borrower of the substantial loan from MBSB. This altered capacity carried serious implications as to the legal liabilities and obligations of the Plaintiff under the charge. The charge annexure could not rectify the situation as the Form 16A was the only instrument recognised under section 242, NLC. The said mistake was not a mere error, omission or technical defect as envisaged under section 380, NLC that could, on application to the Registrar, be corrected. In any event, the Registrar and not the Court was empowered to make the correction that was required. MBSB, thus, cannot in law invoke section 380, NLC to seek on order for rectification of the Form 16A.
>
> [20] The above mistake renders the Form 16A an insufficient and defective instrument for registration of the charge, which would, thus, became defeasible under the provisions of section 340(2), NLC. It was, accordingly, voidable and liable to be declared void at the instance of the chargee.
>
> [21] For the reasons alluded to, section 417, NLC did not have any application to the issues in dispute in the present case as MBSB had not obtained any judgment or order for the Registrar to give effect to.

Court Of Appeal

[17] On appeal, the Court of Appeal agreed with the finding of the learned JC that the mistake in the Form 16A was not an error or omission capable of correction by the Registrar pursuant to s. 380(1)(a) to (c) of the NLC. The appeal was accordingly dismissed.

The Questions Of Law

[18] For ease of reference, we set out below the questions of law posed to us:

> Question 1
>
> Whether indefeasibility under section 340 of the National Land Code (NLC) has relevance where the complaint is of an admitted mistake in the charge form (Borang 16A) where the charge was erroneously described and registered as a first party legal charge instead of a third party legal charge.
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> Question 2
>
> Whether in the case of a mistake in an instrument of dealing under the NLC, the applicable provisions are Sections 207 and 380 of the NLC and Section 62 of the Interpretation Act 1967 to determine if the mistake is a correctable error.

A Question 3

Whether the appropriate test to determine the error is of a matter of substance under the NLC and the Interpretation Act 1948 and 1967 is whether the deviation has changed the character of the instrument or calculated to mislead the parties concerned.

B Question 4

Whether Section 417 of the NLC envisages a two stage procedure whereby a party has to first obtain a judgment or order in separate proceedings before the court can be moved under Section 417 to issue the appropriate directive to the Registrar or Land Administrator to give effect
C to the order.

Our Decision

[19] The questions posed to us arose directly from the decision of the High Court as affirmed by the Court of Appeal. The High Court founded its
D judgment on the error occurring in the charge instrument in Form 16A where paras. (b) and (c) were deleted instead of para. (a) as intended by the parties. As a result of the mistake in the deletion, the plaintiff chargor instead of becoming a third party chargor became a first party chargor. This is contrary to the expressed intention of the parties as provided in the loan agreement
E and the charge annexure.

[20] Let us first consider what is a charge under the NLC? A charge is a dealing in which the registered proprietor of land uses the property as security for the repayment of the loan advanced to him or to a third party. In the case of the former, it is referred to as the first party charge while in
F the case of the latter, it is referred to as the third party charge. In the present case, it is not in dispute that what was commonly intended by the parties was to create a third party charge in favour of the appellant for the loan facilities given to the third party (the borrower company) with the land registered in the name of the respondent as security. Under the NLC, a charge is an interest in land and it will take effect as a security transaction under the NLC
G upon registration. (See s. 243 of the NLC, *The Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd* [1997] 4 CLJ 170; [1997] 3 MLJ 373). It has also been held that when a creation of a charge does not comply with the requirements of the NLC, as when the dealing is not registered, such charge is valid as an equitable charge. (See *Mahadevan Mahalingam v. Manilal & Sons*
H *(M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230; [1984] 1 MLJ 266 (FC)).

[21] In the present case, the charge was registered, but it was set aside by the court on the application of the respondent on the ground that there was an error in Form 16A which created the charge. The High Court in its
I judgment held that the charge was rendered defeasible under s. 340(2)(b) of the NLC on the premise that "it fundamentally conflicted with the loan agreement that was the basis of the charge over the subject land and the

express intention of the contracting parties, could be regarded as an insufficient and defective instrument". The Court of Appeal agreed with the learned JC holding that Form 16A as it stood is an insufficient instrument to create a first party charge as the respondent did not at any time receive the loan sum from the appellant. Both the High Court and Court of Appeal held that the instrument for registration was 'insufficient' because it runs counter to the express term of the loan agreement. Learned counsel for the appellant, however, submitted that the sufficiency of the instrument must be considered purely on the instrument itself ie, we have to consider and examine Form 16A as filed to see whether on the face of it, it suffers from any insufficiency as to render it defeasible under s. 340(2)(b) of the NLC. The relevant provisions of s. 340 of the NLC reads:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

What s. 340(2) provides is that the title or interest of any person referred to in sub-s. (1) is rendered defeasible when the registration was obtained by forgery, or by means of an 'insufficient' or 'void' instrument. In the present case forgery is not an issue. We are, therefore, left with 'insufficient' or 'void' instrument. Haidar J (as he then was) had in the case of *Tan Tock Kwee & Anor v. Tey Siew Cha & Anor* [1995] 4 CLJ 658, rightly ruled that the words 'insufficient' or 'void' appearing in s. 340(2)(b) of the NLC ought to be read disjunctively. We agree with Haidar J that because of the conjunctive 'or' appearing between the words 'insufficient' and 'void' in s. 340(2)(b) of the NLC, therefore, the two words must be read disjunctively and not conjunctively. So any title or interest is not indefeasible if it was obtained by means of either an 'insufficient' or 'void' instrument.

[22] The respondent did not contend that the instrument in the present case is void, their contention is that the charge is liable to be set aside under s. 340(3)(a) of the NLC on the ground that the Form 16A filed herein is an 'insufficient instrument' falling within s. 340(2)(b) of the NLC. For convenience, we set out below Form 16A that was filed in this case:

Borang 16A

GADAIAN

(Untuk Menjamin pembayaran wang pokok)

(Setem hedaklah diletakkan - atau pembayaran cukai diperakui - dalam ruang ini	
UNTUK KEGUNAAN PEJABAT PENDAFTARAN	
Ingatan pendaftaran dibuat dalam Dokumen/Dokumen-Dokumen Hakmilik Daftar yang dijadualkan dibawah ini mulai dari pukul 10.35 pada 2 haribulan AUG, 1999. Pendaftar/Pentadbir Tanah (Tandatangan dan bil) Negeri/Daerah .. Johor	Fail mengenai - Gadaian Jilid ... 4482 Folio ... 10 Perserahan No 35022/99

Kami KCSB KONSORTIUM SDN BHD (No. Syarikat 3999408-A) sebuah syarikat yang di tubuhkan di Malaysia di bawah Akta Syarikat 1965 yang mempunyai alamat berdaftar di No 2752, Jalan Chankat Permata, Taman Permata, 533 UluKelang, Selangor Darul Ehsan, tuanpunya tanah yang diperihalkan dalam Jadual dibawah ini.

(a) pembayaran balik pinjaman sebanyak RM465,000,000.00 yang dengan ini saya mengaku telah terima kepada pemegang gadaian yang tersebut namanya di bawah ini, beserta faedah/~~tanpa faedah~~;

(b) ~~pembayaran jumlah wang sebanyak RM .... kepada pemegang gadaian yang~~ tersebut namanya di bawah ini, beserta faedah/tanpa faedah, dan sebagai balasan –

...

...

Pembayaran kepada pemegang gadaian yang tersebut namanya di bawah ini, berserta faedah/tanpa faedah, akan wang yang dari semasa ke semasa kenedibayar kepadanya daripada akaun semasa saya/akaun yang berikut yang disimpan di antara kami;

dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang yang tersebut itu beserta faedah atasnya mengikut peruntukan-peruntukan yang dilampirkan di sini.

Bertarikh pada 30 haribulan julai, 1999

Penyempuraan suratcara ini oleh KCSB KONSORTIUM SDN BHD (No. Syarikat 3999408-A) dalam satu cara yang dibenarkan oleh Perlembagaannya di bawah Cop Mohor Resminya dan Cop Mohor itu diturunkan disini 30 hb Julai 1999.

(Cop Mohor)

(tt) (tt)

Pengarah Pengarah/Setiausaha

It is not in dispute that the effect of the above Form 16A filed in the present case is to create a first party charge and not a third party charge as intended by the parties. Hence the Form 16A filed runs counter to the loan agreement and the charge annexure.

[23] The critical issue is, does this conflict between Form 16A filed and the loan agreement and the charge annexure render the form to be an 'insufficient instrument' within the meaning of the words in s. 340(2)(b) of the NLC. The word 'insufficient' is not anywhere defined in the NLC, therefore, in our view, it must be accorded an ordinary meaning. The dictionary meaning of the word 'insufficient', is 'not sufficient' or 'inadequate'. (See *Concise Oxford Dictionary* 9th Edition). Given the meaning of the word 'insufficient' can we then conclude that the Form 16A filed herein, is insufficient or inadequate? In this regard, we agree with submission of learned counsel for the appellant that in considering whether the form filed suffers from any insufficiency or otherwise we are to look at the form alone and not elsewhere - meaning to say not to look at the loan agreement or the charge annexure. This view finds support in the High Court case of *Mook Meng Sun v. Loo Aa Kau & Ors* [2002] 2 CLJ 142; [2002] 2 MLJ 193. In that case, the plaintiff sought a declaration that the transfer of certain land by the first and second defendants to the third defendant was void under s. 336 of the NLC. The plaintiff's application was grounded on the fact that he had prior to the registration of transfer obtained a prohibitory order which was still operative on the day of the transfer hence the Registrar should have rejected the instrument of transfer. In that case, the plaintiff's counsel relied on s. 340(2)(b) of the NLC contending that the third defendant's title is defeasible as the registration 'was obtained ... by means of an insufficient or void instrument'. In dismissing the application, Abdul Aziz Mohamad J (as he then was), stated:

> In my opinion, for an instrument to be regarded as an insufficient or void instrument, there must be something about the instrument itself that renders it insufficient or void. There is no evidence as to that as regards the instrument of transfer in this case. As I said, had the instrument been presented and registered a day later, the plaintiff would have no ground to find fault with the registration. The fact that the registration of the instrument was prohibited by reason of the existence of the prohibitory order cannot, in my opinion, affect the character of the instrument so as to render it an insufficient or void instrument. The prohibitory order is extraneous to the instrument and has nothing to do with the character of the instrument.

[24] We agree with the observation of the learned judge in the above case, that in considering whether the instrument was sufficient or not, we have to consider the instrument alone without resorting to other documents which is "... extraneous to the instrument and has nothing to do with the instrument". In the present case, paras (b) and (c) of the charge instrument were deleted hence making it into a first party instead of a third party charge as intended by the parties. Apart from that error, the instrument does not suffer from any other deficiency. Form 16A was sealed with the seal of the respondent's company and attested to by directors of the company or a director together with the secretary of the company. For those reasons, we find that Form 16A

filed in the present case is not an 'insufficient instrument' as envisaged by s. 340(2)(b) of the NLC which renders the charge created pursuant thereto defeasible.

[25] The second issue is whether the error can be corrected pursuant to s. 380(1) of the NLC.

[26] For convenience, we set as below the relevant provisions of the said section.

> Section 380 Correction of errors in documents of title, etc.
>
> (1) Where the Registrar is satisfied
>
> (a) that any document of title has been registered or issued in the wrong name, or contains any mis-description of land or boundaries, or other error or omission, or
>
> (b) that any memorial or other entry has been made in error on any document of title or other instrument relating to land, or
>
> (c) that any memorial or other entry made on any such document of title or instrument itself contains any error or omission,
>
> he may, subject to sub-sections (2) and (3), make such correction on the document or interest in question as may be appropriate in the circumstances of the case.

This section confers upon the Registrar a wide discretion to make any correction on the document of title or instrument relating to land as may be appropriate. It is wide enough to include any entry howsoever wrongly made by the Registry. (See *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114; [1982] 2 MLJ 53). In *Hassan Seman & Ors v. Jusoh Awang Chik* [1981] 1 LNS 15; [1982] 1 MLJ 66, rectification of the register was ordered where the transferee was wrongly registered as having full shares in the land. The correction there was made pursuant to s. 380(1)(c) of the NLC. In that case, Salleh Abas FJ (as he then was) emphasised that the provision relating to indefeasibility and correction must be read separately where His Lordship observed:

> The provision for correction of error is not even treated by the Code as an exception to indefeasibility provision. Thus correction of an error can never be a violation of the indefeasibility principle, and must remain outside the scope of the indefeasibility principle.

Relying on *Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No. 2)* [1970] 1 LNS 150; [1970] 2 MLJ 226, the court then directed the Registrar pursuant to s. 417 of the NLC to correct the error.

[27] Reverting to the present case, it is not in dispute that the deletion of the wrong paragraphs in Form 16A was a mere error and the error does not have the effect of transforming the charge into a transfer or to any other instrument of dealing.

[28] The next question then is whether the error is remediable under the NLC. The test to be applied in this regard was set down by this court in *Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd* [2011] 6 CLJ 137; [2011] 4 MLJ 681. The two tests to be applied are - (a) whether there has been substantial compliance of the prescribed form; and (b) whether any party has been prejudiced or misled by the error.

[29] Applying the two tests to the present case, there is no doubt that there exist substantial compliance with the prescribed form notwithstanding the error. Secondly, it has never been suggested that anyone, be it the respondent or any other party, is ever prejudiced by the error. The respondent never denied that the loan sum of RM59 million had been disbursed to the borrower on the security of the charge, *albeit* it was registered as a first party charge. We do not see what difference would it make to the respondent whether it was first party or third party charge, the relevant property is still subject to a charge. Therefore, we do not see how the respondent could be said to have been prejudiced or misled by the error. On the above premise, we hold that the error in Form 16A filed in this case may be rectified by the Registrar pursuant to s. 380(1)(b) of the NLC to achieve what was intended by the parties.

Section 417 Of The NLC

[30] The appellant is relying on s. 417 of the NLC for the court to give the necessary direction to Registrar to give effect to the decision of the court. Section 417 of the NLC reads:

> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.
>
> (2) Where, pursuant to any order made by virtue of this section, the Registrar or any Land Administrator
>
> (a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or
>
> (b) makes any other amendment of, or addition, to, any such instrument,
>
> he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.
>
> (3) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

As regards the application of s. 417 the Court of Appeal held that before a party, in this case the appellant, could invoke the said section it should first have obtained a judgment or order relating to land under the NLC. The Court of Appeal cited *Woon Kim Poh v. Sa'amah Hj Kasim* [1986] 1 LNS 45; [1987] 1 MLJ 400 in support of the proposition. Upon close scrutiny of the case, we could not find any statement to that effect. What the court said was that, "... s. 417(1) of the National Land Code does not authorise the making of an order or direction contrary to the National Land Code itself".

[31] The case of *Tan Soo Bing & Ors v. Tan Kooi Fook* [1997] 1 CLJ 556; [1996] 3 MLJ 547 was also cited in support of the same proposition. The respondent relied on what was said by Wan Adnan FCJ (as he then was) at p. 562 (CLJ); p. 554 (MLJ) which reads:

> In our view, the words '... be necessary to give effect to any judgment or order given or made in any proceedings' in s. 417(1) are very important. These words limit the power of the court to give directions to the registrar. The court can only give directions to the registrar if such directions are necessary to give effect to any judgment or order of the court. **There must first be a final judgment or order of the court. Then only, in order to give effect to such judgment or order, the court can give directions to the registrar**. (emphasis added)

The words bolded were construed to mean that there must first exist a final judgment or order of the court then only the court can give direction under s. 417 to give effect to the judgment or order.

However, at p. 562 (CLJ); p. 555 (MLJ), the learned judge elaborated further in the following words:

> Thus, where for example the court in a proceeding relating to a particular piece of land makes an order that an instrument of transfer in respect of such land is void, the court may direct the registrar to remove any memorial made pursuant to such void instrument of transfer from the register and issue document of title in respect of the said land. Such direction is necessary to give effect to the order that the court has made.

In our view, what the learned judge said was that any court making an order on any matter which relates to land may, consequent upon the order, give such direction to the Registrar as may be necessary to give effect to such order. There is nothing in the judgment to say that a party has to firstly obtain the order of court in one proceeding and subsequently apply in another proceeding for a direction under s. 417 of the NLC. Therefore, we do not find anything in the judgment which goes to support the two-stage approach/ process, as submitted by learned counsel for the respondent.

[32] On the contrary, we find that there are ample authorities to support the single-stage approach as advocated by learned counsel for the appellant. (See *Hasan Seman (supra); United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b and *Takako Sakao v. Ng Pek Yuen & Anor (No 2)* [2010] 1 CLJ 419; [2010] 2 MLJ 181).

[33] In *Takako Sakao* this court unequivocally stated:

> To prevent any further fraud and for the purpose of preserving the subject property *in specie*, on 27 October 2009 we directed the Registrar of Titles to enter his caveat pursuant to s .320 read with s. 321 of the National Land Code. We did so in the exercise of the powers conferred by s. 417 of the National Land Code. **It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment**. (emphasis added)

In our view, it is clear that under s. 417 of the NLC, the court is vested with the power to direct the Registrar to do anything it deems necessary to give effect to its judgment or order. This broad power is conferred by the NLC on the court to ensure that judgment or order of the court is duly carried out by the Registrar.

Conclusion

[34] For the reasons alluded to above, we hold that the impugned charge is a valid charge and accordingly the order of the High Court as affirmed by the Court of Appeal is set aside. Further, in exercise of the power under s. 417 of the NLC, we direct the Registrar to review the file relating to the said charge and cause the rectification of the charge as a third party charge.

[35] In the result, we allow the appeal with costs.